INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statement	2
Discussion	5

CITATIONS

Cases:	
Clackamas County, Ore. v. *McKay*, 219 F. 2d 479 reversed and remanded, 349 U.S. 909, rehearing denied, 349 U.S. 934	1
Hazelton v. *Sheckells*, 202 U.S. 71	6
Houston v. *Ormes*, 252 U.S. 469	5, 7
Marshall v. *Baltimore and Ohio Railroad Company*, 16 How. 314	6
McKay v. *Clackamas County, Oregon*, 349 U.S. 909, rehearing denied, 349 U.S. 934	3, 6, 7
Mellon v. *Orinoco Iron Co.*, 266 U.S. 121	5
Morgenthau v. *Fidelity & Deposit Co. of Maryland*, 94 F. 2d 632	7
Pilger v. *Sutherland*, 57 F. 2d 604	7
Textile Mills Corp. v. *Comm'r.*, 314 U.S. 326	6
Tool Company v. *Norris*, 2 Wall. 45	6
Trist v. *Child*, 21 Wall. 441	6
United States v. *Munsingwear*, 340 U.S. 36	7
Statute:	
Act of June 24, 1954, 68 Stat. 270, 43 U.S.C. 1181 (g), Supp. IV	3, 6

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 429

BENTON COUNTY, OREGON, ET AL., PETITIONERS

v.

A. W. LAFFERTY, RICHARD L. MERRICK, AND ROBERT B. ANDERSON, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT GOVERNMENT OFFICIALS

OPINIONS BELOW

The opinion of the District Court dated March 19, 1956, and the opinion of the Court of Appeals dated June 13, 1957, have not been reported. These opinions appear in the petition at pages 1a–8a. A prior opinion by the Court of Appeals, upon which its opinion in the instant case rests, is reported as *Clackamas County, Ore.* v. *McKay,* 219 F. 2d 479 (C. A. D. C.), reversed and remanded for dismissal as moot, 349 U. S. 909, rehearing denied, 349 U. S. 934.

JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1957 (Pet. 9a). The petition for a writ of certiorari was filed on September 4, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The basic question of concern to the Government is whether the award of an attorney's fee, payable from funds derived from the sale of timber from lands owned by the United States, for influencing the passage of legislation regulating the distribution of the funds so derived is so offensive to public policy as to be invalid.

STATEMENT

In the early 1940's, a disagreement arose between the Department of Agriculture and the Department of the Interior with respect to the administration of some 472,000 acres of federally owned lands in Oregon. Contracts for the sale of timber on these lands had been entered into by the Department of Agriculture (Forest Service) and were producing substantial revenue. If the lands were properly subject to administration by the Department of Agriculture, 25% of the timber sale proceeds would go to the eighteen Oregon counties in which the lands were located and 75% would go to the United States. On the other hand, if these lands were to be considered subject to administration by the Department of the Interior as "O & C lands", then 75% of the timber sale proceeds was to go to the counties and 25% to the United States.

With an impasse existing on this basic issue, it was agreed that moneys received from timber sales should be placed in a special deposit account until such time as the issue could be resolved.

In 1952, a suit was instituted by Clackamas County, Oregon, against the Secretary of the Interior and the Secretary of Agriculture to obtain a declaration that the lands were properly subject to administration by the Department of the Interior and, in effect, that 75% of the fund should be paid to the eighteen interested Oregon counties in accordance with the so-called "O & C" formula. The suit was dismissed by the District Court for lack of jurisdiction. The United States Court of Appeals for the District of Columbia Circuit reversed the judgment and remanded the case for further proceedings. While a petition for rehearing was pending in that court, Congress enacted the Act of June 24, 1954, 68 Stat. 270, 43 U. S. C. 1181 (g), Supp. IV, which mooted the issue, *i. e.*, it directed that administration of the lands be left with the Department of Agriculture but that all timber income, including the past amounts collected in the special deposit account, be distributed under the "O & C" formula. The Court of Appeals denied the petition for rehearing. However, this Court granted certiorari, vacated the judgment below, and directed the dismissal of the litigation as moot. *McKay* v. *Clackamas County, Oregon*, 349 U. S. 909, rehearing denied, 349 U. S. 934.

In June, 1954, the instant suit was brought by the attorneys for Clackamas County, respondents herein, to assert that their efforts preserved the fund for

the benefit of the other seventeen Oregon counties, and that they were entitled to a reasonable attorneys' fee payable out of the fund. Since passage of the Act of June 24, 1954, *supra*, the accrued fund of approximately $8,000,000 has been distributed as directed by Congress except that the sum of $800,000 has been retained because of the pendency of this case.[1]

In March, 1956, the District Court issued a memorandum opinion in which it concluded (Pet 1a) that:

> the services rendered by the plaintiffs did not produce any benefit to the seventeen counties but that the fund in which they shared was the product of legislation which, in fact, the plaintiffs opposed; that since the litigation which the plaintiffs conducted did not benefit the seventeen counties, they are not liable for attorneys fees on the asserted principle that the plaintiffs created the fund in which the seventeen counties shared.

Accordingly, the District Court ordered that "judgments be entered in favor of the defendants and each of them against the plaintiffs". The attorney respondents appealed. Expressing the view that they had rendered services "which were of value and

[1] As noted in fn. 3, pp. 10–11, of the petition for certiorari filed in *McKay* v. *Clackamas County, Oregon*, No. 604, October Term, 1954, the Government officials offered to distribute the $800,000 under the 1954 Act if all the Oregon counties involved, and their counsel, would agree that, without prejudice to the merits of their positions in the attorneys' fee dispute, any attorneys' fee which might be awarded in connection with this matter would be payable from the counties' share of future receipts from the lands involved. Such agreement was not forthcoming.

achieved substantial benefits for the counties" (Pet. 7a), the Court of Appeals reversed the judgment of the District Court. The seventeen Oregon counties, petitioners herein, are now seeking certiorari.

DISCUSSION

In the lower courts, the Government officials, who were designated as defendants in this action, took a neutral position on the merits of this dispute. They neither affirmed nor denied that the respondents Lafferty and Merrick were entitled to an attorneys' fee payable out of the fund now in the United States Treasury. Because of certain statements in the opinion of the Court of Appeals and its failure to deal with a problem important to the Government, this memorandum for the respondent Government officials is now being filed.[2]

1. If the Court of Appeals was awarding fees for bringing about the successful passage of the legislation, as some parts of its opinion suggest (see Pet. 4a–6a, 7a), it was adopting a rule which should not be countenanced. As indicated by the authorities cited

[2] It is conceded, as it was in the courts below, that approximately $600,000 of the amount retained in the special deposit account is due and owing to the petitioning Oregon counties and to Clackamas County. A portion of the fund was retained only because of this litigation. In these circumstances, if it is authoritatively found that a valid lien for attorneys' fees exists; that all parties will be bound by the decree; and that it will be "a full acquittance to the United States for any and all claims and demands of the parties arising out of or connnected with said claim" (*Houston* v. *Ormes*, 252 U. S. 469, 472; *Mellon* v. *Orinoco Iron Co.*, 266 U. S. 121, 125–127); presumably, the respondent government officials would not be prejudiced by a decree directing the payment. See *infra*, pp. 7–8.

in the petition (Pet. 16), it is established law that a contingent fee contract for influencing or attempting to influence the passage of favorable legislation is void and unenforceable as against public policy. An award of fees for the influencing of legislation would likewise appear to be contrary to the decisions of this Court. *E. g.; Marshall* v. *Baltimore and Ohio Railroad Company*, 16 How. 314, 334–336; *Tool Company* v. *Norris*, 2 Wall. 45, 54–55; *Trist* v. *Child*, 21 Wall. 441, 448–453; *Hazelton* v. *Scheckells*, 202 U. S. 71, 78–79; *Textile Mills Corp.* v. *Commissioner*, 314 U. S. 326, 338.

2. The opinion of the Court of Appeals suggests that the United States complied with the order of the Court of Appeals when making payments to the Oregon counties. But as this Court was advised in the petition for certiorari filed on behalf of the Government officials in *McKay* v. *Clackamas County, Ore.*, No. 604, October Term, 1954, pp. 2, 10, 13, 14, the payments to the counties were made under the Act of June 24, 1954, 68 Stat. 270, 43 U. S. C. sec. 1181 (g), Supp. IV. Indeed, there was no court decree which had attained finality, and the decree referred to by the Court of Appeals never did attain finality so as to become an effective court order. The motion for rehearing and the petition for certiorari, which were duly filed, kept the decree of the Court of Appeals from becoming binding upon the Government officials. And, since that judgment was vacated by this Court and the case in which it had been issued was remanded for dismissal as moot (*McKay* v. *Clackamas County, Ore.*,

349 U. S. 909, rehearing denied, 349 U. S. 934), the result was as if the case had never been brought, and no legal consequences could flow from it. *United States* v. *Munsingwear*, 340 U. S. 36, 41.[3] Furthermore, as was spelled out in the petition for certiorari in the *Clackamas County* case, *supra* (No. 604, October Term, 1954, pp. 16–18), there were reasons other than mootness why the judgment of the Court of Appeals in that case should not stand.

3. From the viewpoint of the Government, the opinion of the Court of Appeals is further deficient in the following respect: As this Court made clear in *Houston* v. *Ormes*, 252 U. S. 469, 472, before a mandatory order could be entered directing the named government officials to pay a part of the fund to the respondents Lafferty and Merrick, the United States would have to have a proper acquittance against the counties. In other words, before the relief demanded in the complaint could be granted, it must be found that the court has jurisdiction over the Oregon counties. Absent such a finding, no relief can be granted against the remaining defendants. *Pilger* v. *Sutherland*, 57 F. 2d 604, 607 (C. A. D. C.), quoted with approval in *Morgenthau* v. *Fidelity & Deposit Co. of Maryland*, 94 F. 2d 632, 634 (C. A. D. C.). While the question whether the actions of the seventeen

[3] Since its decree was thus never an effective one, the possible doubt which the Court of Appeals raises as to the validity of the congressional act (Pet. 7a) is unwarranted and was disposed of when this Court rejected the arguments against dismissal as moot. See the petition and briefs filed in No. 604, October Term, 1954.

counties amounted to a voluntary appearance was raised in the Court of Appeals, the opinion is silent on the subject.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

PERRY W. MORTON,
Assistant Attorney General.

ROGER P. MARQUIS,
HAROLD S. HARRISON,
Attorneys.

SEPTEMBER 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957